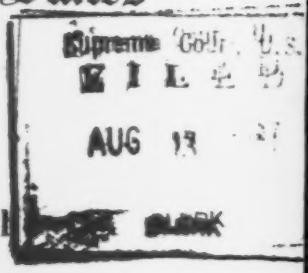
No. 97-105

In The Supreme Court Of The United States

OCTOBER TERM 1996



BOARD of ZONING APPEALS of th CITY of VIRGINIA BEACH; ADAMS OUTDOOR ADVERTISING,

Petitioners,

v.

PATRICK A. JANEZECK,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Virginia

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. **Does the Petition for Writ of Certiorari present a question cognizable by this Court?**

II. **Does the denial of the subject variances constitute an unconstitutional taking of property without just compensation?**

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BASIS FOR JURISDICTION IN THIS COURT

The Respondent disputes the basis for jurisdiction asserted by Adams. While Adams states that the case warrants the exercise of the Court's supervisory power under Rule 10 (a), none of the reasons set forth in the rule as calling for the exercise of that power apply, and no other reason appears for the exercise of jurisdiction by the Court. This case is an ordinary local zoning dispute presenting no compelling reason for the granting of a writ of certiorari, as required by Rule 10, and does not even present a cognizable question for review.

STATEMENT OF THE CASE

The Statement of Facts contained in the Petition for Writ of Certiorari misstates the holding of *Lamar Corp. v. City of Richmond*, 241 Va. 346, 402 S.E.2d 31 (1991). *Lamar* does not hold that the owner of a billboard located on leased property is not entitled to compensation in an eminent domain proceeding; to the contrary, it clearly recognizes that the billboard's owner *is* entitled to compensation. The case holds merely that the billboard owner is not entitled to a *separate proceeding* to determine the compensation for his interest in the property condemned.

Adams fails to mention that it fully acquiesced in the dismissal of the condemnation case involving its billboards by endorsing, as agreed, the dismissal order and that it

failed to appeal the dismissal. Only after it agreed to the dismissal of the case did Adams apply for, and receive, variances allowing the billboards to remain in place.

ARGUMENT AND AUTHORITIES

I. The Petition for Writ of Certiorari does not present a question of law cognizable by this Court

The sole question presented for review is whether the subject variances should have been granted. That question is purely one of State law; as a result, this case is not one in which the Court may grant review under 28 U.S.C. §1257.

The granting or denial of variances in Virginia is exclusively the function of local boards of zoning appeals, Va. Code Ann. § 15.1-495 (Supp. 1996) and, upon appeal, Virginia courts of general jurisdiction. Va. Code Ann. § 15.1-497 (Supp. 1996). The decisional standards, which are set forth in Section 15.1-495, are exclusively State standards. A decision granting or denying a variance application is thus entirely a matter of State law.

Adams asks the Court only to review the question of whether the Virginia Supreme Court erred in affirming the trial court's denial of the subject variances. While Adams states, without support in the record, that the variances were initially granted by the Board of Zoning Appeals "to prevent the confiscation and outright loss of Adams' property rights," it does not ask the Court to determine

whether the ultimate denial of the variances was an unconstitutional taking of its property, and it does not assert that any other question of federal law is present in the case.[1] Accordingly, the case does not present for review any question cognizable by this court under 28 U.S.C. §1257.

II. The denial of the subject variances does not constitute an unconstitutional taking without just compensation.

Adams claims, in effect, that it was entitled to variances allowing it to keep its billboards because it was not compensated for their loss, even though it willingly gave up the right to seek compensation for them in State court.

Even if the issue of whether Adams has suffered an unconstitutional taking of its property were properly before the Court, no taking could be found on this record. Adams, which now complains of the uncompensated taking of its property, had a full and fair opportunity in State court to seek the compensation to which it was entitled for the condemnation of its billboards. As admitted by Adams, the Virginia Department of Transportation filed condemnation proceedings in 1988 in

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[1] In light of the fact that the record is utterly insufficient to allow the Court to decide whether there has been a taking of Adams's property, Adams could not in good faith even ask the Court to decide that question.

which the compensation due Adams was to be determined. It was not until 1994 that the order dismissing the condemnations was entered. During that entire period, Adams did not bring the cases to trial.

Adams protests to this Court, as it did to the trial court and the Supreme Court of Virginia, that the case of *Lamar Corp. v. City of Richmond*, 241 Va. 346, 402 S.E.2d 31 (1991), divested it of its right to compensation. That assertion greatly exaggerates the import of *Lamar*, which holds only that a billboard owner who is the tenant of the underlying fee is not entitled to a separate proceeding to determine compensation for the value of the billboards taken. It does not, nor under the most basic principles of constitutional law could it, stand for the proposition that a property owner is not entitled to compensation for the taking of its property.

Perhaps even more telling of the merits of Adams's petition is the fact that Adams *affirmatively agreed* to the dismissal of the condemnation cases in which the compensation for the loss of the billboards was to be determined. Petitioner's App. 11-12. It thus willingly gave up its right to seek compensation in State court. Having done so, it now complains that it is the victim of an uncompensated taking. That contention was roundly rejected by the trial court and the Virginia Supreme Court.

It may be anticipated that Adams will argue that, even if *Lamar* did not *expressly* divest it of the right to compensation for the loss of its billboards, it *effectively* did

so because the condemnation case involving the underlying realty had previously been decided. That argument, however, does nothing to change the facts that Adams agreed to the dismissal of the case, failed to appeal the dismissal, and failed to assert the principle that case decisions should not be applied retroactively so as to produce inequitable results. *See, e.g., Chevron Oil Co. v. Huson*, 404 U.S. 97, 92 S.Ct. 349, 30 L.E.2d 296 (1971); *Shiflet v. Eller*, 228 Va. 115, 319 S.E.2d 750 (1984); *Fountain v. Fountain*, 214 Va. 347, 200 S.E.2d 513 (1973). Adams's loss was patently self-inflicted, and it cannot now ask for redress of a grievance it has itself created. *See Steele v. Board of Zoning Appeals*, 246 Va. 502, 436 S.E.2d 453 (1993).

CONCLUSION

For the foregoing reasons, the Respondent respectfully requests that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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APPENDIX

APPENDIX

Statutes of the United States

28 U.S.C. § 1257:

(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

(b) For the purposes of this section, the term "highest court of a State" includes the District of Columbia Court of Appeals.

Virginia statutes

Virginia Code Section 15.1-497:

Any person or persons jointly or severally aggrieved by any decision of the board of zoning appeals, or any aggrieved taxpayer or any officer, department, board or bureau of the county or municipality, may present to the circuit court of the county or city a petition specifying the

grounds on which aggrieved within thirty days after the filing of the decision in the office of the board.

Upon the presentation of such petition, the court shall allow a writ of certiorari to review the decision of the board of zoning appeals and shall prescribe therein the time within which a return thereto must be made and served upon the relator's attorney, which shall not be less than ten days and may be extended by the court. The allowance of the writ shall not stay proceedings upon the decision appealed from, but the court may, on application, on notice to the board and on due cause shown, grant a restraining order.

The board of zoning appeals shall not be required to return the original papers acted upon by it but it shall be sufficient to return certified or sworn copies thereof or of such portions thereof as may be called for by such writ. The return shall concisely set forth such other facts as may be pertinent and material to show the grounds of the decision appealed from and shall be verified.

If, upon the hearing, it shall appear to the court that testimony is necessary for the proper disposition of the matter, it may take evidence or appoint a commissioner to take such evidence as it may direct and report the same to the court with his findings of fact and conclusions of law, which shall constitute a part of the proceedings upon which the determination of the court shall be made. The court may reverse or affirm, wholly or partly, or may modify the decision brought up for review.

Costs shall not be allowed against the board, unless it shall appear to the court that it acted in bad faith or with malice in making the decision appealed from. In the event the decision of the board is affirmed and the court finds that the appeal was frivolous, the court may order the person or persons who requested the issuance of the writ of certiorari to pay the costs incurred in making the return of the record pursuant to the writ of certiorari. If the petition is withdrawn subsequent to the filing of the return, the board may request that the court hear the matter on the question of whether the appeal was frivolous.